91-214

No. 91-(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEMPLE OF THE LOST SHEEP INC., a/k/a Action Committee to Help the Homeless Now and HENRY JEROME MACKEY, a/k/a Jerome Mackey,

Petitioners,

—v.—

ROBERT ABRAMS, Attorney General of the State of New York, NEW YORK NEWS, INC., JACK NEWFIELD, JOHN DAVIS, and THOMAS WHELAN, and JILL LAURIE GOODMAN,

Respondents,

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TEMPLE OF THE LOST SHEEP INC., A/K/A ACTION COMMITTEE TO HELP THE HOMELESS NOW, and HENRY JEROME MACKEY, pro se,

MEMORANDUM DECISION AND ORDER

Plaintiffs,

CV-88-3675(ADS)

-against-

ROBERT ABRAMS, Attorney General of the State of New York, ROBERT ABRAMS, JILL LAURIE GOODMAN, NEW YORK NEWS, INC., JACK NEWFIELD, JOHN DAVIS, and THOMAS WHELAN,

Defendants,

----------x

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SPATT, District Judge.

Although several challenges are raised by these motions to dismiss, the Court finds that the primary issue presented here is as follows: does a state court decision upholding the validity of a subpoena issued by the State Attorney General, have collateral estoppel effect on a civil rights action against the Attorney General and others which is based primarily upon the Attorney General's issuance of the subpoena in connection with an investigation of possible fraudulent activities? The resolution of this issue is further complicated by reason of a determination of abstention that another Judge of this Court ordered while the motions dealing with the subpoena were pending in state court. For the reasons that follow, this Court finds that the First and Fourteenth Amendment constitutional claims raised here, either actually were or could have been raised in state court, and therefore the doctrine of collateral estoppel applies to preclude re-litigation of the issues raised here. The Court also finds that the claims based upon conspiracy in violation of 42 U.S.C. § 1985(3),

fail to state a claim upon which relief may be granted, and must also be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Finally, in view of these determinations, the plaintiffs' remaining state-law claim must likewise be dismissed.

FACTUAL BACKGROUND

A detailed description of the factual background surrounding this action is succinctly set forth in Judge Reena Raggi's Memorandum and Order in *Temple of the Lost Sheep Inc. v. Abrams*, CV-88-3675, slip op. at pp. 3-14 (E.D.N.Y. June 7, 1989), which recitation is familiar to all parties and counsel. Set forth below is a summary of the facts stated in the plaintiff's complaint relevant to the instant motions.[1]

The Temple of the Lost Sheep Inc. a/k/a Action Committee to Help the Homeless Now ("Temple"), is an entity that operated as an unincorporated religious society from approximately 1960 to 1980. Henry Jerome Mackey ("Mackey") has been affiliated with the organization since its inception, and, in 1979 he participated in its incorporation pursuant to New York's Religious Corporation Law.

The Temple maintains a shelter for the homeless in Flushing, Queens, New York. One of its stated objectives is "to provide a haven wherein persons who believe themselves to be 'Lost Souls' may find a temporary refuge, during which time they may seek their own Spiritual regeneration through prayer, and the study of the Bible and other religious works" (Second Amended Complaint, paragraph 2). As a condition of membership, and as part of their religious activity, the members are required to "solicit alms from the donating public" by taking part in begging (*id.*). Most of the money received each day is turned over to Mackey and the Temple. According to the plaintiffs, "[b]y so doing, the members are able to solve their own problems by experiencing God's blessings" (*id.*).

Footnote 1: As a part of their Second Amended Complaint, the plaintiffs have attached and incorporated by reference, numerous affidavits, newspaper articles, correspondence, subpoenas and other documents. Pursuant to Fed. R. Civ. P. 10(c), all of that material is considered a part of the complaint "for all purposes".

The defendants John Davis ("Davis") and Thomas Whelan ("Whelan"), are homeless persons who were originally admitted to the Temple shelter in 1988, but who later defected from the organization.

The defendant New York News Inc. is the publisher of the *Daily News* newspaper ("Daily News"). The defendant Jack Newfield ("Newfield"), is a staff writer and regular columnist for the Daily News.

When Davis and Whelan left the shelter, they contacted reporter Newfield of the Daily News and advised him that the Temple required its members to go out and "beg" as a condition to staying in the shelter, and that the proceeds were turned over to Mackey. Newfield thereafter arranged a meeting with the Attorney General of the State of New York ("Attorney General"), to have Davis and Whelan report their story to that office for possible investigation.

On October 20, 1988 and November 2, 1988, the Attorney General, through Assistant Attorney General Jill Laurie Goodman, issued subpoenas to be served on several "John Doe" Temple members in support of an administrative investigation into their activities. On October 21, 1988, another subpoena was served on Mackey, directing his appearance on November 2, 1988. The subpoena also called for the production of books, records and other Temple documents. The purpose of the subpoenas was to determine whether further proceedings should be brought pursuant to various provisions of New York's Business Corporations Law, General Business Law, Executive Law, Not-For-Profit Corporations Law, and Estate, Powers and Trusts Law. Specifically, the Attorney General alleged that he was investigating the possibility of fraud under the guise of charitable activity.

In the interim, on October 24, 1988, Newfield wrote a story which ran in the Daily News on the Temple's activities and the investigation (*see* Second Amended Complaint, Exhibit "T"). In particular, Newfield recounted Mackey's criminal past, described the Temple's operations and reported

about the experiences of Davis and Whelan and the plaintiffs. He also reported about Mackey's personal wealth, despite Mackey claiming in a telephone interview that all funds collected by the members are used solely for the Temple's services, and that he himself draws an income of less that $5,000 a year. In sum, Newfield cautioned passersby to "beware of Jerome Mackey's upside-down water coolers". The following day, Newfield wrote another article reporting about the issuance of the Attorney General subpoenas (see Second Amended Complaint, Exhibit "X").

Without complying with the subpoenas, on November 22, 1988, the plaintiffs commenced this federal court action by order to show cause against the defendants based on alleged violations of the Temple's and Mackey's constitutional rights under 42 U.S.C. § 1983, as well as conspiracy to violate their constitutional rights under 42 U.S.C. § 1985(3). In particular, the plaintiffs alleged that the defendants conspired to deprive them of their First and Fourteenth Amendment rights and violated their rights of privacy and association, free exercise of religion, equal protection of the law and the establishment clause of the First Amendment.

According to the plaintiffs, there was an overall conspiracy to financially cripple the Temple. The plaintiffs alleged that the defendants agreed among themselves that the Daily News would publish a series of damaging articles on the Temple and Mackey, and that the Attorney General would undertake an investigation of their activities. The plaintiffs alleged that these constitutional violations began not with this most recent investigation, but rather as early as the 1960's ever since Mackey was on the Attorney General's "hit list". Mackey alleged that the Attorney General's systematic harassment of him began with the investigation into the operation of his self-defense schools (*see,, e.g., United States v. Corr*, 543 F.2d 1942 [2d Cir. 1976] [employee of Jerome Mackey's Judo Inc. convicted of various counts of securities fraud, mail fraud and perjury with regard to financing of the business]), his stereo tape distributing business (*see, e.g., United States v. Mackey*, 405 F. Supp. 854 (E.D.N.Y. 1975]

[mail fraud], and now continues with the investigation into the Temple's activities. Because of these alleged constitutional deprivations, the plaintffs sought injunctive relief from further harassment and compensatory and punative damages.

On December 6, 1988, Judge Raggi denied the plaintiffs' application to preliminarily enjoin the Attorney General from continuing its investigation and to require the Daily News to give "equal space" to the plaintiffs in their publication.

Meanwhile, the Temple and Mackey continued to fail to comply with the administrative subpoenas issued earlier. On December 6, 1988 the Attorney General made a motion before Justice Edward Greenfield in Supreme Court, New York County, for an order to compel compliance. The Temple and Mackey cross-moved to quash the subpoenas, as well as to dismiss the proceeding brought by the Attorney General.

In the interim, while the motions in state court were *sub judice*, the Daily News and Attorney General moved in this Court before Judge Raggi, requesting dismissal or in the alternative an abstention from further proceedings until such time as the state court rules on the validity of the subpoenas. On June 7, 1989, Judge Raggi granted the defendants' motion by abstaining from exercising federal jurisdiction over the plaintiff' action until such time as the state court proceeding came to a conclusion. Judge Raggi specifically chose to stay, rather than dismiss the action, reasoning as follows:

> "Because there is some question as to whether plaintiffs can obtain full legal as well as equitable relief if they are successful in the pending state proceedings, the court stays, rather than dismisses, this action against the Attorney General and his assistant until this is clarified."

Temple of the Lost Sheep, Inc. v. Abrams, No. CV-88-3675, slip op. at p. 20 (E.D.N.Y. June 7, 1989).

Judge Raggi "abstain[ed] from hearing plaintiffs' federal claims until the conspiracy issue is resolved in state court as to the Attorney General" (slip op. at p. 22), and declined to rule on all other claims "until the state proceeding concludes, since the decision in that case may very well modify, *if not dispose of*, certain of the claims raised here" (slip op. at p. 22) (emphasis supplied).

Thereafter, on January 4, 1990, Justice Greenfield rendered a decision on the motions in the state court proceeding, which granted the Attorney General's motions to compel compliance with the subpoenas and denied the Temple's cross-motions to quash and dismiss. With respect to Judge Raggi's abstention decision, Justice Greenfield stated:

> "With respect to that part of the cross-motion for an order to stay and enjoin the Attorney General from continuing with the investigation upon the ground that there is another and prior action pending between the same parties in the Federal District Court, *this court finds that the District Court has deferred to this court to determine the various issues raised by Mackey and the Temple*. Therefore, it is not necessary for this court to discuss and determine the overlapping of the two actions and whether the resolution of the Federal action will be dispositive of this proceeding to compel compliance with the subpoena."

Matter of Abrams v. the Temple of the Lost Sheep, Inc., No. 88-47250, N.Y.L.J., Jan. 16, 1990, at p. 27, col.4 (Sup. Ct. N.Y. County Jan. 4. 1990) (emphasis supplied).

The Temple initially appealed Justice Greenfield's decision to the Appellate Division, First Department, but later withdrew the appeal and complied with the subpoenas by producing documents.

On March 30, 1990, the Temple moved to set aside the abstention on the ground that Justice Greenfield's decision "finally determined" the state action, and that therefore this matter should proceed with discovery and trial. At oral argument, this Court directed the parties to address the issue of when the state administrative matter is deemed to be "concluded" within the meaning of Judge Raggi's order. On April 13, 1990, this Court vacated the stay previously directed by Judge Raggi since the State court action is now considered to be concluded.

The defendants now make the instant motions to dismiss on the grounds of collateral estoppel, failure to state a claim, and in the case of the Attorney General, qualified immunity. In the alternative, the defendants move for a continuation of abstention by this Court. In the interim, pending a determination by the Court on these motion, the defendants also seek a stay of all discovery.

DISCUSSION

1. Motion for a Stay of Discovery.

The defendants requested a stay of all discovery pending a determination on these motions, which application was granted by the Court at oral argument on May 18. 1990.

Although not expressly authorized by stature or rule (*cf.* N.Y. Civ. Prac. L.& R. 3214[b] [discovery stayed pending motion to dismiss]), the federal district courts do have discretion to authorize a stay of discovery pending the determination of dispositive motions (*see, e.g., Transunion Corp. v. Pepsico, Inc.*, 811 F.2d. 127, 130 [2d Cir. 1987] [protective order preventing discovery pending determination on motion to dismiss for *forum non conveniens* is permissible]). Discovery should only be stayed, however, where, as here, there are no factual issues in need of further immediate exploration, and the issues before the court are purely questions of law (*see, e.g., F.H. Krear & Co. v. 19 Named Trustees,*

91 F.R.D. 497, 498 [S.D.N.Y. 1981]; *see also Jarvis v. Regan*, 833 F.2d. 149, 155 [9th Cir. 1987]; *Florsheim Shoe Co. v. United States*, 744 F2d 787, 797 [Fed. Cir. 1984]).

2. Motions to dismiss.

Since both the Daily News and the Attorney General move for similar relief, namely, to dismiss, or, in the alternative, for an abstention, a discussion of the law and facts applicable to both parties' motions is treated together, except where the parties' arguments or facts may differ.

(a). Collateral Estoppel :

Both the Daily News as well as the Attorney General allege that the decision of Justice Greenfield has preclusive collateral estoppel effect in this case. Specifically, the defendants maintain that Justice Greenfield addressed the constitutional claims in upholding the validity of the subpoenas issued, and that he made findings that there was no "bad faith" on the part of the Attorney General, thus entitling him to the cloak of qualified immunity. The defendants also contend that Justice Greenfield made a finding that there was no conspiracy or collusion between the defendants. Finally, the defendants urge that, in addition to Justice Greenfield's decision, Judge Raggi made certain findings in her abstention decision on the issue of bad faith, which is now the law of the case.

In opposition, aside from primarily arguing the merits of their case, (Footnote 2), the plaintiffs allege that

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Footnote 2: Rather than focusing on the collateral estoppel effect, if any, of Justice Greenfield's decision, the plaintiffs devote much of their memorandum of law to this contention that the Attorney General lacks authority to conduct such an investigation into the affairs of a charitable non-profit organization. This, however, is precisely the issue that Justice Greenfield decided in a second related proceeding involving Mackey (*see Abrams v. New York Foundation for the Homeless*, N.Y.L.J., Jan. 16, 1990, at p. 27, col. 6 [Sup. Ct. N.Y. County Jan. 4, 1990]).

collateral estoppel or res judicata does not bar claims that could not have been and were not actually litigated in state court.

Pursuant to 28 U.S.C. § 1738, a federal court is required to apply the rules of collateral estoppel of the state in which a prior judgment was rendered, where the same issues are later raised in federal court (*see Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 [1984] [citing cases]. Accordingly, the Court turns to the New York law on the issue of collateral estoppel.

It is well settled that "[u]nder collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first cause" (*Allen v. McCurry*, 449 U.S. 90, 94 [1980]). "Application of the doctrine of collateral estoppel requires a finding of the [identicality of an issue necessarily decided in the prior action' and [a full and fair opportunity to contest the issue in the prior action'" (*Benjamin v. Coughlin*, 905 F.2d 571, 575 [2d cir. 1990]. *quoting Halyalkar v. Board of Regents*, 72 N.Y. 2d 261, 266, 527 N.E. 2d 1222, 1224, 532 N.Y.S. 2d 85, 87 [1988]). A district court is precluded from relitigating not only claims that were actually litigated and determined in a prior proceeding, but also those claims that "*could have been litigated* in the prior state court proceedings" (*Collard v. Incorporated Village of Flower Hill*, 604 F. Supp. 1318, 1323, [E.D.N.Y. 1984] [emphasis supplied], aff'd, 759 F.2d 205 [2d Cir.], *cert. denied*, 474 U.S. 827 [1985]).

Under New York law, in order for collateral estoppel to bar relitigation of an issue in a subsequent action or proceeding, two elements must first be met:

> (1) the issue to be decided in the second action is identical to an issue necessarily decided in a prior proceeding' and

> (2) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding.

Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 482 N.E.2d 63, 67, 492 N.Y.S. 2d 584, 588, [1985].

The requirement of identity of issues is an absolute one, requiring a careful examination of the facts in the context of both the state and federal action (*see Wilder v. Thomas*, 854 F.2d 605, 617 [2d Cir. 1988], cert denied sub nom. *Wilder v. New York State Urban Dev. Corp.*, 109 S.Ct. 1314 [1989]).

In order to determine the collateral estoppel effect, if any, of Justice Greenfield's order, it is necessary to review his decision in light of Judge Raggi's abstention decision.

In Judge Raggi's abstention decision dated June 7. 1989, the specific arguments that the Temple and Mackey raised in their motion before Justice Greenfield in opposing the subpoenas were summarized as follows:

> "Among arguments raised in support were: (a) that the subpoenas were beyond the jurisdictional authority of the Attorney General as granted by New York law; (2) that because a church is involved, subpoenas can only issue on the showing of a compelling state interest; (3) that the first and fourth amendments to the constitution preclude holding a church in contempt for failing to disclose its financial records; (4) *that the Attorney General was engaged in a conspiracy to deprive Mackey and the Temple of constitutional rights*; (5) that compliance with the subpoenas would infringe rights of privacy, association and religious belief."

Temple of the Lost Sheep Inc. v. Abrams, No CV-88-3675, slip op. at p. 13 (E.D.N.Y. June 7, 1989) (emphasis supplied).

After reviewing the factors to determine the appropriateness of an abstention, Judge Raggi held:

> "There being no evidence of bad faith sufficient to excuse abstention and *this court being convinced that plaintiffs can adequately raise their constitutional challenges to the Attorney General's conduct in pending state proceedings*, this court abstains from now addressing those claims. Because there is some question as to whether plaintiffs can obtain full legal as well as equitable relief *if they are successful* in the pending state proceedings, the court stays, rather than dismisses, this action against the Attorney General and his assistant until this is clarified." Slip op. at p. 20 (emphasis supplied).

Judge Raggi also noted that the Temple does not dispute that it was able to raise the constitutional issues before the state court in seeking to have the subpoenas quashed:

> "Plaintiffs do not dispute that they can raise their constitutional challenges to the Attorney General's investigation in the pending state proceeding. Indeed, in moving to have the state court quash the outstanding subpoenas, plaintiffs argued that compliance would infringe constitutional rights of privacy, association and religious belief. They have, moreover, advised the state court that they believe themselves to be the victims of a conspiracy aimed at abridging these constitutional rights. The

> state court is clearly competent to address these constitutional challenges to the subpoenas, for it has long been recognized that [[u]pon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States . . . whenever those rights are involved in any suit or proceeding before them'". Slip op. at p. 17, *quoting Robb v. Connolly*, 111 U.S. 624, 637 (1884).

Specifically as to the possible collateral estoppel effect that Justice Greenfield's decision *might* have on this litigation, Judge Raggi anticipated the following:

> "How the state court rules with respect to the question of whether the Attorney General was involved in any conspiracy with the other named defendants — and if he was, whether their mutual objectives were unconstitutional — could, after all, have collateral estoppel effect in proceedings in this court, *at least as against plaintiffs*.
>
> * * *
>
> The court will not address defendants' remaining challenges to plaintiffs' claims until the state proceeding concludes, since the decision in that case may very well modify, *if not dispose of*, certain of the claims raised here." Slip op. at pp. 21-22(emphasis supplied).

In addition to abstaining, Judge Raggi made an express finding that the plaintiffs failed to support their allegations that the Attorney General acted improperly in carrying out the investigation, by stating that, "this court finds no basis for concluding that the Attorney General is pursuing his investigation of Mackey's latest venture without any expectation of achieving a legitimate law enforcement goal" (*see* slip op. at p. 19).

In upholding the validity of the subpoenas, Justice Greenfield noted that he was aware of the pending federal court action and was familiar with all of the papers filed. He "stressed that the investigation does not prevent Mackey or the Temple from practicing their religious activity, nor is it disruptive to such activity" (*Abrams v. Temple of the Lost Sheep, Inc.*, No. 88-47250, N.Y.L.J., Jan.16, 1990, at p. 27, col. 4 [Sup. Ct. N.Y. County Jan. 4, 1990]). Justice Greenfield proceeded to make the following findings:

> "After reviewing the complaints of Mackey and the Temple in the District Court action and the papers submitted by them in this proceeding, this court finds no basis for concluding that the Attorney General is acting in bad faith in pursuit of his investigation of either Mackey or the Temple.
>
> The blanket objection by Mackey and the Temple that compliance with the subpoena would deprive them of their Fifth Amendment right to be free from self-incrimination has no merit. Neither the Temple nor its officers have any Fifth Amendment rights against the production of corporate records pursuant to lawful judicial order (*Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186). Moreover, with respect to respondents' Fourth Amendment rights involving both State and

> Federal searches and seizure, all that is required is that the subpoenaed materials be relevant to the investigation being conducted and that the subpoena not be overbroad or unreasonably burdensome. *Far Rockaway Nursing Home v. Hynes*, 44 NY 2d 383."

Significantly, Justice Greenfield held that "this court finds that the District Court has deferred to this court to determine the various issues raised by Mackey and the Temple. Therefore, it is not necessary for this court to discuss and determine the overlapping of the two actions and whether the resolution of the Federal action will be dispositive of this proceeding to compel compliance with the subpoena".

It is well settled that in attempting to quash a subpoena duces tecum in state court, the burden is on the petitioners "to make at least *some* showing that production of the information sought would impair their 1st Amendment rights" (*Matter of Full Gospel Tabernacle, Inc. v. Attorney General of the State of New York*, 142 A.D.2d 489, 493, 536, N.Y.S. 2d 201, 203 [3d Dep't 1988] [emphasis supplied]; *see also Matter of Grand Jury subpoenas for Locals 17, 135, 257 & 608 of United Brotherhood of Carpenters & Joiners*, 72 N.Y. 2d. 307, 528 N.E. 2d. 1195, 532 N.Y.S. 2d. 722. *cert. denied sub nom. Local 17 of United Brotherhoood of Carpenters & Joiners v. New York*, 488 U.S. 966 [1988]). Once that showing is made, the burden shifts to the Attorney General to show "that the infringement is outweighed by a compelling state interest, to which the information sought is substantially related, and that the State's ends may not be achieved by less restrictive means" (*see Full Gospel, supra [citations omitted]*}. Accordingly, on the motions by the Temple and Mackey to quash, they were required to make at least *some* showing that the production would infringe on their First Amendment rights

Significantly, Judge Raggi *stayed* rather than *dismissed* the action because she found that "there is some

question as to whether plaintiffs can obtain full legal as well as equitable relief *if they are successful* in the pending state proceedings." (slip op. at p. 20 [emphasis supplied]). If the plaintiffs had made some showing that their constitutional rights had been infringed or had they been successful before Justice Greenfield, the only relief available to them in state court was to quash the subpoenas; there were no claims for monetary or injunctive relief pending before him. Accordingly, had the Temple and Mackey been successful in state court, they could then have proceeded to pursue their claims for equitable and monetary relief in this Court.

However, the Temple was not successful in the state proceeding. In fact, the burden to show a compelling state interest never even shifted to the Attorney General, since Justice Greenfield found that the plaintiffs failed to sustain their burden of making *some* showing of a constitutional violation. In this regard, Judge Raggi correctly predicted that the outcome of the state court proceedings "could, after all, have collateral estoppel effect in proceedings in this court, *at least as against plaintiffs*" (slip op. at p. 21 [emphasis supplied]).

Therefore, Justice Greenfield's decision does collaterally estoppel the plaintiffs from relitigating their constitutional claims, namely, those based upon the First and Fourteenth Amendments. In opposing the subpoenas in state court, the Temple argued that the Attorney General had to make a showing of compelling state interest; that compliance with the subpoenas violated their rights of privacy, association and religious belief; that production would infringe on their Fourth and Fifth Amendment rights; and that the Attorney General was engaged in a conspiracy to deny Mackey and the Temple their constitutional rights. In sum, the plaintiffs' constitutional claims were specifically rejected by the state court in finding that the Temple and Mackey had not met their burden in opposing the subpoenas by showing any constitutional violations by the defendants. It is clear therefore, that the Temple had a full and fair opportunity to raise the precise constitutional claims that are now brought before this Court.

Had Justice Greenfield found that the plaintiffs made some showing of a violation, then the doctrine of collateral estoppel would not have been applicable as against the plaintiffs.

On the contrary, Justice Greenfield found "no basis for concluding that the Attorney-General is acting in bad faith in pursuit of his investigation of either Mackey or the Temple". Judge Raggi has already determine that :

> "Plaintiffs do not dispute that they can raise their constitutional challenges to the Attorney General's investigation in the pending state proceeding. Indeed, in moving to have the state court quash the outstanding subpoenas, plaintiffs argued that compliance would infringe constitutional rights of privacy, association and religious belief. They have, moreover, advised the state court of a conspiracy aimed at abridging these constitutional rights.
>
> * * *
>
> [T]here has been no court finding to date of any improper conduct by the Attorney General or his staff in its investigations of Mackey-related enterprises. Neither does the record reflect continued threats of prosecution despite a history of unsuccessful attempts.
>
> * * *
>
> [There is] no basis for concluding that the Attorney General is pursuing his investigation of Mackey's latest venture without any expectation of achieving a legitimate law enforcement goal.

> To the extent that plaintiffs urge a finding of bad faith from alleged collusion between the Attorney General and the *Daily News*, the court finds conclusory allegations in this regard insufficient to support such an inference. No facts have been alleged indicating that the *Daily News* reports on the Temple were published at the behest of the Attorney General, rather than on the independent editorial judgment of the newspaper. The mere fact that the *Daily News* arranged for former Temple members to meet with officials at the Attorney General's office and recount possible financial improprieties on the part of plaintiffs does not demonstrate bad faith." Slip op. at pp 17-20.

Accordingly, because the First and Fourteenth Amendment claims which are the basis for this lawsuit against the Attorney General and Daily News in the federal court, are exactly the same as those which were presented before Judge Raggi in her prior decision and Justice Greenfield in passing upon the propriety of the subpoenas, the doctrine of collateral estoppel now bars relitigation of those issues, since this Court finds that the Temple and Mackey were afforded a full and fair opportunity to make at least some showing of these constitutional violations in state court. Therefore, the plaintiffs' claims under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments, are dismissed.

(b) Failure to State a Claim:

1. Claims Under 42 U.S.C. § 1985(3).

In addition to finding that the decisions of Judge Raggi and Justice Greenfield have collateral estoppel effect here as to the First and Fourteenth Amendment claims under 42 U.S.C. § 1983, the defendants urge, and the Court finds,

that the Temple's Second Amended Complaint fails to state a claim under Fed. R. Civ. P. 12(b)(6) for violation of 42 U.S.C. § 1985(3). Although the factual allegations in the complaint are sharply disputed by the parties, the court accepts all of the plaintiffs' allegations as true in regard to the motions to dismiss for failure to state a claim (see *Neustein v. Orbach*, 732 F. Supp. 333, 343 [E.D.N.Y. 1990] [citing cases]).

In order to state a claim for conspiracy under 42 U.S.C. § 1985(3), a plaintiff must allege that the defendants (1) engaged in a conspiracy, (2) for the purpose of either directly or indirectly depriving him or a class of persons of which he is a member equal protection of the laws; and that (3) acts taken by the defendant in furtherance of the conspiracy (4) deprived him or the class the exercise or privilege of a citizen of the United States (*see New York State NOW v. Terry*, 886 F. 2d 1339, 1358 [2d Cir. 1989], cert. denied, 110 S. Ct. 2206 [1990]; see also *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, [1971]; *Sorlucco v. New York City Police Dep't*, 888 F. 2d 4, 8 [2d Cir. 1989]). Under section 1985, a plaintiff must also demonstrate "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action'" (*New York State NOW v. Terry*, 886, F. 2d at p. 1358, quoting *Griffin v. Breckenridge*, 403 U.S. at pp. 102-03.[3] Although the precise reach of section 1985(3) remains somewhat unresolved (*see, e.g., United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 835-37 [1983] [leaving open the question of whether statute is aimed against any other class based animus other than directed at blacks]), it has been held to encompass women as a class (*see, e.g., New York State NOW v. Terry, supra*, 886 F. 2d. at p. 1359), classes based on political association (*see e.g., Keating v. Carey*, 706 F. 2d 377, 386 [2d Cir. 1983]), and those based on religion (*see, e.g., Volk v. Coler*, 845 F. 2d 1422, 1434 [7th Cir. 1988]). However, it is well settled that class-based *economic* animus is beyond the reach of a claim under section 1985 (*see Scott, supra*, 463 U.S. at p. 838-39;

Footnote 3: The term "animus" has been defined by the Second Circuit as "merely describ`ing] a person's basic attitude or intention" (*New York State NOW v. Terry, supra*, 886 F.2d. at p. 1359).

see also Chow v. Coughlan, CV-88-1563, slip op. at pp. 8-11 [E.D.N.Y. June 28, 1990] [low-income tenant organizers are not a protected class under 42 U.S.C. § 1985]).

The plaintiffs' conspiracy claims under section 1985 fail to state a claim for two reasons. First, even as to this Second Amended Complaint, the Court agrees with Judge Raggi's prior determination that the plaintiffs' allegations of bad faith from alleged collusion between the Attorney General and Daily News are "conclusory allegations . . . insufficient to support such an inference". According to Judge Raggi, "[t]he mere fact that the *Daily News* arranged for former Temple members to meet with officials at the Attorney General's office and recount possible financial improprieties on the part of plaintiffs does not demonstrate bad faith" (slip op. at pp. 19-20). This Court agrees and declines to disturb that finding, not because of the doctrine of "law of the case" as the defendants urge, but rather because this Court finds that the Second Amended Complaint adds, in effect, nothing more than what was before Judge Raggi. Additionally, the Court notes that similarly, Justice Greenfield also found that the Attorney General properly exercised his authority to investigate the Temple's affairs and that the Attorney General did not act in "bad faith" in carrying out the investigation.

Second, the plaintiffs have failed to allege with any degree of specificity or particularity the acts alleged to have been taken by the defendants in furtherance of the conspiracy which may have deprived the plaintiffs of any privileges or rights under the constitution. The plaintiffs mere conclusory allegations of a conspiracy, without more, simply do not state a claim for violation of constitutional rights. A constitutional conspiracy claim must be pled with some degree of particularity (*see Bertucci v. Brown*, 663 F. Supp. 447, 454 [E.D.N.Y. 1987]; *see also Neustein v. Orbach, supra*, 732 F. Supp. at p. 346 ["allegations that Orbach engaged in a conspiracy . . . are no more than naked improbable unsubstantiated assertions without any specifics"]).

Accordingly, pursuant to Fed. R. Civ. P. 12(b)(6), the plaintiffs' claims under 42 U.S.C. § 1985(3), are dismissed for failure to state a claim.[4]

2. Injury to Reputation.

In addition to alleging the constitutional deprivations set forth above, the plaintiffs allege that their reputation has been diminished by the Daily News articles and Attorney General's investigation. In opposition, the Daily News alleges that the publication of articles about the Temple which resulted in an investigation by the Attorney General, do not rise to the level of constitutional violations actionable under section 1983. The Daily News further alleges that even if the reputation of the Temple or Mackey has been damaged as a result of the publication of the articles, the law of defamation provides ample redress. Furthermore, the Daily News contends that the element of "state action" on its part is absent, especially in light of the findings of Judge Raggi and Justice Greenfield that no bad faith collusion existed between the Daily News and the Attorney General. This Court agrees.

It is well settled that injury or damage to reputation in and of itself is insufficient to invoke due process protection (*see Paul v. Davis*, 424 U.S. 693, 701 [1976]). To the extent that the plaintiffs may possess a cause of action for defamation, absent a federal question or diversity, that kind of action, standing alone does not belong in the federal court, and the Court declines to exercise pendent jurisdiction over such a claim. Also, the plaintiffs failed to sufficiently allege the required "state action" on the part of the Daily News defendants to support a claim under 42 U.S.C. § 1983. Accordingly, insofar as the plaintiffs allege a cause of action based on injury to reputation, that claim is dismissed.

Footnote 4: Although the Daily News urges dismissal for lack of subject matter jurisdiction rather than failure to state a claim, the Court notes that the complaint plainly seeks relief under the federal Constitution and therefore the latter motion is the proper one (*see Spencer*

3. Qualified Immunity.

Notwithstanding the foregoing multi-facited dismissal of the plaintiffs' claims, the Court also finds that the Attorney General is entitled to the cloak of "qualified immunity" from any action to recover damages under section 1983.

It is well settled that while prosecutors have absolute immunity from section 1983 liability for actions taken during the course of a judicial proceeding (*see Imbler v. Pachtman*, 424 U.S. 409, 417-19 [1976]; *see also Schloss v. Bouse*, 876 F. 2d 287 [2d Cir. 1989] [absolute immunity for "quasi-judicial" acts as well]), qualified immunity attaches when they are acting in their "administrative" or "investigative" capacities, as in this situation (*see Barr v. Abrams*, 810 F. 2d 358, 361 [2d Cir. 1987]). "The test is whether the prosecutor is engaged in activities that are [intimately associated with the judicial phase of the criminal process'" (*Day v. Morgenthau*, 909 F. 2d 75, 78 [2d Cir. 1990], *quoting Imbler v. Pachtman, supra*, 424 U.S. at p. 430 [other citations omitted]).

In order to be entitled to qualified immunity, the prosecutor must demonstrate that he or she acted in "good faith" (*see Powers v. Coe*, 728 F. 2d 97, 103 [2d Cir. 1984]), which requires " a showing that his [or her] acts were objectively reasonable" (*Day v. Morgenthau, supra*, 909 F. 2d at p. 78). As stated above, both Judge Raggi and Justice Greenfield found that the Attorney General and his staff acted properly in carrying out the investigation, and that he had not acted in bad faith. The Court is cognizant that Judge Raggi's finding was made at a threshold pleading state on a motion to dismiss. However, this Court finds that with regard to this issue, the plaintiffs have not pled any additional facts which would lead this Court to depart from Judge Raggi's conclusion. Accordingly, with respect to the Attorney General defendants, the court finds that the Attorney General and his staff acted in good faith and are entitled to immunity from a section 1983 damages action for their activities undertaken in connection with the investigation of the affairs of the Temple and Mackey.

c. Motion for Continued Abstention.

Both the Daily News and the Attorney General argue that if the Court does not dismiss the action, then a continuation of the prior abstention order is appropriate at this time, since, according to the Attorney General, the investigation is ongoing.

Because the Court is dismissing this action in its entirety, the defendants' motion for renewal of abstention is now rendered moot.

d. Motion for Sanctions.

The Daily News seeks Rule 11 sanctions against the plaintiffs for filing this action and continuing to litigate these issues.

Rule 11 was enacted to "discourag[e] dilatory and abusive litigation tactics and eliminat[e] frivolous claims and defenses, thereby speeding up and reducing the costs of the litigation process" (*McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 21 [2d Cir. 1990]; *see also* Fed. R. Civ. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 198 [1983] ["should. . . help to streamline the litigation process by lessening frivolous claims or defenses"]). Sanctions should be sparingly imposed, however, and care should be taken to avoid chilling creativity or stifling enthusiasm (*see Securities Indus. Ass's v. Clarke*, 898 F.2d 318, 322 [2d Cir. 1990]). However, once a violation of the Rule is found, the district court *must* impose sanctions (*see O'Malley v. New York City Transit Auth.*, 896 F. 2d 704, 709 [2d Cir. 1990]).

Applying the "objectively reasonable" test to the plaintiffs' papers as this Court must (*see Eastway Constr. Corp. v. City of New York*, 762 F. 2d 243, 253 [2d Cir. 1985]), the Court finds that neither the plaintiffs nor counsel for the plaintiff Temple violated Rule 11, and therefore declines to

impose sanction. Accordingly, the Daily News' motion for sanctions is denied.

CONCLUSION

Based upon the foregoing, the defendants' motions to dismiss are granted as follows : the plaintiffs' claims arising under 42 U.S.C. § 1983 for violations of their First and Fourteenth amendment rights are dismissed as barred by the doctrine of collateral estoppel based on the decisions of Judge Raggi and Justice Greenfield, and additionally, as to the Attorney General defendants, based upon qualified immunity. The plaintiffs' claims under 42 U.S.C. § 1985(3) are also dismissed under Fed. R. Civ. P. 12(b)(6), for failure to state a claim. The plaintiffs' remaining state-law claims are dismissed for lack of subject matter jurisdiction. Accordingly, the Second Amended Complaint is dismissed in its entirety.

The defendants' motion for renewed abstention is denied as moot, and the Daily News' motion for sanctions is denied.

SO ORDERED.

Dated : Brooklyn, New York
September 25, 1990

ARTHUR D. SPATT
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1103—August Term 1990

Argued: February 20, 1991 Decided: April 5, 1991

Docket No. 90-7981

TEMPLE OF THE LOST SHEEP INC., a/k/a ACTION COMMITTEE TO HELP THE HOMELESS NOW, and HENRY JEROME MACKEY,

Plaintiffs-Appellants,

- against -

ROBERT ABRAMS, Attorney General of the State of New York, NEW YORK NEWS, INC., JACK NEWFIELD JOHN DAVIS, THOMAS WHELAN and JILL LAURIE GOODMAN,

Defendants-Appellees.

Before:

FEINBERG, TIMBERS and MINER,
Circuit Judges.

Appeal from judgment of the United States District Court for the Eastern District of New York, Arthur D. Spatt, J., dismissing the complaint on the grounds that plaintiffs were collaterally estopped from pursuing their claims arising under 42 U.S.C. § 1983 because a prior related state court proceeding resolved against plaintiffs issues central to those claims; plaintiffs' claim arising under 42 U.S.C. § 1985(3) failed to state a claim and there was a lack of subject matter jurisdiction for plaintiffs' remaining state-law claims.

Affirmed.

JAMES ROBERSON JR., New York, NY, for Plaintiff-Appellant.

KEVIN W. GOERING, New York, NY (Coudert Brothers, P. Rivka Schochet, of counsel), for Defendants-Appellees New York News, Inc. and Jack Newfield.

WILLIAM K.SANDERS, New York, NY, Assistant Attorney General for the State of New York (Robert Abrams, Attorney General of the State of New York, of Counsel), for Defendants-Appellees Robert Abrams and Jill Laurie Goodman.

FEINBERG, *Circuit Judge*:

This fiercely contested litigation, which has been conducted in both federal and state courts since the fall of 1988, involves the interaction of the doctrines of abstention and collateral estoppel. Plaintiffs Temple of the Lost Sheep

Inc., a/k/a Action Committee to Help the Homeless Now (the Temple), and Henry Jerome Mackey appeal from a judgment of the United States District Court for the Eastern District of New York, Arthur C. Spatt, J., dismissing their complaint against Robert Abrams, Attorney General of the State of New York, Assistant Attorney General Jill Laurie Goodman (the State defendants) New York News, Inc., Jack Newfield (the Daily News defendants), John Davis and Thomas Whelan. The district court dismissed appellants' claims arising under 42 U.S.C. § 1983 because a state court proceeding had resolved against appellants issues central to those claims, and alternatively, as against the State defendants, those claims were barred by qualified immunity. The district court also found that appellants' claims arising under 42 U.S.C. § 1985(3) failed to state a claim under Fed. R. Civ. P. 12(b)(6), The court then dismissed the remaining state-law-claims for lack of subject matter jurisdiction. For the reasons given below, we affirm.

Background

According to the complaint, the Temple operated as an unincorporated religious society from approximately 1960 to 1980 and was thereafter incorporated pursuant to New York's Religious Corporation Law. Appellant Mackey is a founder of the Temple and its "titular head." One of the Temple's stated objectives is "to provide a haven wherein persons who believe themselves to be [Lost Souls' may find a temporary refuge, during which time they may seek their own Spiritual regeneration." Towards that end, the Temple maintains a shelter for homeless men in Queens, New York. Those residing at the shelter must comply with the Temple's goals and rules. In particular, members are required to "solicit alms from the donating public" by begging, and they then turn over most of those proceeds to Mackey and the Temple.

Defendants John Davis and Thomas Whelan are homeless persons who were admitted to the Temple shelter in 1988. They later defected from the organization and con-

tacted defendant Jack Newfield, at that time a staff writer and regular columnist for the Daily News newspaper published by defendant New York News, Inc. After Davis and Whelan told Newfield that as a condition for staying in the shelter, the Temple required its members to beg and then turn over the proceeds to Mackey, Newfield arranged to have Davis and Whelan tell their story to defendant Attorney General for possible investigation.

The Attorney General began an administrative investigation to determine whether the Temple was engaging in fraud under the guise of charitable activity in violation of various provisions of New York statutory law, and accordingly issued subpoenas in the fall of 1988, through defendant Assistant Attorney General Jill Laurie Goodman, to be served on several "John Doe" Temple members and Mackey. In the interim, Newfield wrote two stories in the Daily News, which recounted Mackey's criminal past, reported his personal wealth, described the Temple's operations and the experiences of Davis and Whelan, cautioned passersby to "beware of Jerome Mackey's upside-down water coolers" and reported the issuance of the Attorney General's subpoenas.

Without complying with the subpoenas, appellants commenced this suit in the Eastern District in November 1988, alleging various violations of their constitutional rights under 42 U.S.C. § 1983 and a conspiracy to violate their rights under section 1985(3). Appellants alleged that pursuant to an overall conspiracy to financially cripple the Temple, defendants agreed that a series of damaging articles on the Temple and Mackey would be published in the Daily News and that the Attorney General would undertake an investigation of their activities, including issuance of the subpoenas at issue. The complaint also alleged that Mackey had been on the Attorney General's "hit list since the 1960's as evidenced by various investigations to which Mackey or his businesses had been subjected. See *e.g.*, *United States v. Corr*, 543 F.2d 1042 (2d Cir. 1976) (employee of Jerome Mackey's Judo Inc. convicted of securities fraud and other crimes with regard to financing of the business): *United States v. Mackey*, 405 F. Supp. 854

9E.D.N.Y 1975)(Mackey convicted of mail fraud relating to his operation of Mackey Distributors, Inc.). Appellants sought injunctive relief from further harassment and compensatory and punative damages for the alleged constitutional deprivations.

Appellants also moved for a preliminary injunction prohibiting the Attorney General from continuing his investigation and requiring the Daily News to give "equal space" to appellants in that newspaper. In December 1988, Judge Reena Raggi denied the motion on the grounds, among others, that the court would probably abstain from hearing the case, and that plaintiffs had not established a likelihood of success on the merits.

At that time, the Temple and Mackey had still not complied with the subpoenas, and the Attorney General moved before Justice Edward Greenfield in Supreme Court, New York County, for an order to compel compliance. The Temple and Mackey cross-moved to dismiss the proceedings and to quash the subpoenas in part on the ground that the Attorney General issued the subpoenas pursuant to a conspiracy to deprive the Temple and Mackey of their constitutional rights. While these motions were pending in state court, the State and Daily News defendants moved in the district court before Judge Raggi for dismissal of appellants' complaint or in the alternative for abstention from further proceedings until the state court ruled on the validity of the subpoenas. In June 1989, Judge Raggi granted the motion, and stayed this action pending the conclusion of the related state court proceeding.

Appellants thereafter moved for Judge Raggi's recusal on the ground that she was biased. The judge denied the motion in June 1989. The Temple and Mackey appealed from this order and also sought a writ of mandamus in this court compelling the judge to recuse herself. This court dismissed the appeal, and also denied the petition for mandamus.

In addition, according to appellants, they moved in the state court to prevent Justice Greenfield, in deciding the motions pending before him, from making any determination regarding appellants' federal claim of conspiracy. In January 1990, however, Justice Greenfield ruled on the motions before him, granting the Attorney General's motion to compel compliance with the subpoenas and denying appellants' cross-motions to quash and dismiss, thereby rejecting appellants' conspiracy claim. Appellants initially appealed Justice Greenfield's decision the the Appellate Division, First Department, but later withdrew their state appeal and apparently complied with the subpoenas.

Appellants also returned to the Eastern District and moved to vacate Judge Raggi's order staying the federal proceedings. The case was reassigned to Judge Spatt, and in June 1990 he found that the state court action had been concluded, and allowed the federal action to proceed. Subsequently, defendants moved to dismiss the federal complaint, and Judge Spatt granted that motion in September 1990 in part on the ground that appellants' section 1983 claims were barred by the doctrine of collateral estoppel. This appeal followed.

Discussion

A. *Abstention and Reservation of Federal Claims*

Appellants contend that the district court erred in applying collateral estoppel to their section 1983 claims, because they intentionally avoided raising those claims in the state court so as to reserve them for determination in the district court under the doctrine of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). The plaintiffs in *England* had commenced an action in federal court, alleging that a state statute violated their federal constitutional rights. Id. at 412-13. Plaintiffs also claimed that the state law did not apply to them. The district court then

abstained and remitted plaintiffs to the state courts on the ground that a state court decision interpreting the statute could moot the constitutional claims. Id. at 413. Plaintiffs voluntarily submitted both the state law and constitutional claims to the state court, which decided them adversely to plaintiffs. Id. at 413-14. The Supreme Court held that plaintiffs could have reserved their federal claims and thereby avoid preclusion, by informing the state court that they intended to return to federal court to pursue the federal claims should the state court rule against them on the question of state law. Id. at 421-22. According to appellants, under *England* a party is always able to reserve its federal claims whenever a district court abstains, and thus the district court here erred by precluding appellants from pursuing their "reserved" federal claims. We disagree.

It is clear that in *England*, the federal court abstained under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)(*Pullman* abstention), which "involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate, or at least to alter materially, the constitutional question presented." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477 (1977). By contrast, the district court in this case abstained under the authority of *Younger v. Harris*, 401 U.S. 37 (1971) (*Younger* abstention), which is warranted when there is an ongoing state proceeding involving an important state interest that provides the federal plaintiff with an adequate opportunity for judicial review of its federal constitutional claims. *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 224 (2d Cir.), cert denied, 484 U.S. 830 (1987).

According to the Supreme Court, "[t]he holding in *England* depended entirely on this Court's view of the purpose of abstention" in a particular case. *Allen v. McCurry*, 449 U.S. 90, 101-02 n.17 (1980). It is thus necessary for us to determine whether the policies behind abstention in this case require appellants to be provided with the opportunity of reserving their federal claims, recognizing of course that this

was a *Younger* rather than a *Pullman* abstention. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 & n.18 (1975).

The emphasis in *England* on a plaintiff's right to reserve its federal claims for determination in the federal court is a direct result of the purposes behind a *Pullman* abstention, because

> [W]here a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone, rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court's erroneous construction of state law..

Allen, 449 U.S. at 101-02 n.17 (citations omitted)

Significantly, *Pullman* abstention does not necessarily involve an ongoing state proceeding. Instead, the abstention serves to allow a state proceeding to address the state law issues in deference to the state court's superior ability to determine unsettled questions of state law. *Pullman* abstention, as stated in *England*, essentially recognizes that by so deferring to the state courts, a federal court may not relieve itself of the jurisdictional duty it faced in the first instance. *Younger* abstention, however, gives rise to a different set of considerations, since it involves two pending proceedings and thus conflicting jurisdictional duties between the state and federal tribunals with the attendant possibilities that maintenance of the federal action will either result in duplicative legal proceedings or a disruption of the state proceedings. *Cf. Steffel v. Thompson*, 415 U.S. 452, 461-62 (1974). The situation is therefore not one of merely postpon-

ing federal jurisdiction as is the case in *Pullman* abstention, but instead "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).

The rationale for allowing reservation of a federal claim in a state court proceeding following *Pullman* abstention in a federal court is thus not applicable to *Younger* abstention; this indicates that reservation is not available in the latter case. Indeed, this conclusion is compelled by the fact that *Younger* abstention derives from the recognition

> that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing [state proceeding] would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the Constitution of the United States.

Steffel, 415 U.S. at 460-61 (citation omitted)

If, as appellants argue, a federal plaintiff could avoid the preclusive effects of the related state court proceeding by reserving its federal claims after the federal court abstains under *Younger*, then the federal court would fail to give effect to the ability of the state court to resolve federal constitutional questions, thereby undermining one of the central purposes behind *Younger* abstention. Moreover, such an approach would result in at least partially duplicative proceedings, one of the problems that *Younger* abstention attempts to remedy. Thus, the purposes behind *Younger* abstention suggest that a federal plaintiff may be collaterally es-

topped by a related state court proceeding, regardless of the plaintiff's desire to "reserve" the federal claim.

We accordingly hold that a federal plaintiff may not avoid preclusion by reserving in the state court its federal claims following *Younger* abstention. Judge Weinfeld reached this result in *Olitt v. Murphy*, 453 F. Supp. 354, 358 (S.D.N.Y.), aff'd without opinion, 591 F.2d 1331 (2d Cir. 1978), cert. denied, 444 U.S. 825 (1979), and although our summary affirmance there had no precedential value, we take this opportunity to explicitly adopt Judge Weinfeld's holding. The Ninth Circuit has also reached this result. See *Beltran v. California*, 871 F. 2d 777. 783 n.8 (9th Cir. 1988). Therefore, appellants' attempt, if any, to reserve their federal claims in the state court for later determination in federal court did not of itself prevent Judge Spatt from applying collateral estoppel based on Justice Greenfield's decision in the state court proceeding. The question still remains whether Judge Spatt was otherwise justified in applying that doctrine.

B. *The Collateral Estoppel Effects of the State Proceeding*

Pursuant to 28 U.S.C. § 1738, the federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81, (1984). We have accordingly given a state court judgment preclusive effect in a subsequent action in federal court seeking relief under section 1983. *E.g., Collard v. Incorporated Village of Flower Hill*, 759 F. 2d 205, 207, (2d Cir.)(per curiam), cert. denied, 474 U.S. 827 (1985).

Under New York law, the "[a]pplication of the doctrine of collateral estoppel requires a finding of the identicality of an issue necessarily decided in the prior action and a full and fair opportunity to contest the issue in the prior action." *Benjamin v. Coughlin*, 905 F.2d 571, 575 (2d Cir. 1990). Appellants argue that neither of these requirements is

satisfied here. It is clear to us, however, that the district court properly found that appellants were collaterally estopped from pursuing their section 1983 claims, since the record shows that the state court directly decided issues that are central to appellants' 1983 claims and that appellants had a full and fair opportunity to litigate those issues.

The record shows that when Judge Raggi entered the June 1989 abstention order, she clearly contemplated that appellants' conspiracy allegations-which were central to their section 1983 claims-would be decided in the pending state proceeding before Justice Greenfield when he decided the cross-motion to quash the subpoenas. Under New York law, a subpoena will be quashed if compliance will unduly infringe upon fundamental rights such as those guaranteed by the First Amendment. See *Matter of Grand Jury Subpoenas*, 72 N.Y. 2d 307, 312, cert. denied, 488 U.S. 966 (1988). Judge Raggi thus properly found in the abstention order that appellants "can adequately raise their constitutional challenges to the Attorney General's conduct in pending state proceedings." Indeed, Judge Raggi summarized one of the arguments that the Temple and Mackey raised in their cross-motion in the pending state court proceeding as whether "the Attorney General was engaged in a conspiracy to deprive Mackey and the Temple of constitutional rights."

The abstention order also recognized the preclusive effects that would flow from the state court's determination. Significantly, Judge Raggi stayed the federal action rather than dismissing it, because if appellants had been *successful* in the state proceeding the only relief available to them there was to quash the subpoenas. Thus, by staying the federal action, Judge Raggi provided appellants with the opportunity for returning to federal court to receive monetary or injunctive relief for any constitutional violations found by the state court. *Cf. Davidson v. Capuano*, 792 F. 2d 275, 282 (2d Cir. 1986). Conversely, the judge also recognized in the order that if appellants were not successful in the state court, then those state court findings could have preclusive effect against appellants upon their return to federal court.

In light of the district court's abstention order, appellants were on notice that issues pertaining to their constitutional claims would be determined in the state court. Moreover, appellants took advantage of this opportunity. Although appellants now contend otherwise, one of the issues they chose to raise in the state court was their constitutional challenge to the subpoenas. In an affidavit submitted in the state court in support of the cross-motion to quash the subpoenas, the Temple's attorney alleged that the Attorney General met with Newfield, Davis and Whelan and issued the "meritless subpoenas." and that the Daily News defendants published the libelous articles as part of a conspiracy to deprive the Temple and Mackey of their civil rights. The attorney then state that "[i] would be impossible for this Court to compel compliance with those subpoenas if it is found that the Attorney General did in fact conspire to deprive plaintiffs of their Constitutional rights."

Appellants therefore chose to place the conspiracy allegations, which were central to their section 1983 claims, directly in issue in the state court proceeding. Justice Greenfield was aware that his decision might affect appellants' claims in the federal court, since he held that the district court "has deferred to this court to determine the various issues raised by Mackey and the Temple." In light of the foregoing, Judge Spatt properly found that the state court had adversely resolved issues central to appellants' constitutional claims when it denied the cross-motion to quash the subpoenas and granted the Attorney General's motion to enforce, and that appellants had a full and fair opportunity to litigate those issues in the state court.

Appellants argue that because their entire section 1983 claim was not before the state court, the issues decided were not "identical." However, Justice Greenfield denied the cross-motion after finding that the investigation did not "unnecessarily interfer[e] with First Amendment freedoms" and did not prevent "Mackey or the Temple from practicing their religious activity, nor is it disruptive to such activity." Justice Greenfield also found that there was "no basis" for concluding

that the Attorney General was acting in bad faith in pursuing the investigation of either Mackey or the Temple. These findings that the State defendants did not violate appellants' constitutional rights by issuing the subpoenas or pursuing the investigation thus bar appellants' conspiracy claim in the district court, since "[i]t is the wrongful act, not the conspiracy, which is actionable." *Singleton v. City of New York*, 632 F. 2d 185, 192 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981); *see United States v. Sacco*, No 90-1002 (2d Cir. March 11, 1991). Moreover, appellants had an opportunity to challenge those findings in the state court, but chose not to pursue an appeal. Under the circumstances, we will not consider their argument to us that the findings were based upon an inadequate record, which they were not allowed to develop.

Appellants also argue that collateral estoppel is inapplicable here because they had a right to trial by jury in the federal court whereras the state court determination was made by a judge. The Seventh Amendment, however, does not prevent the use of collateral estoppel in this context. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979). Moreover, under New York law, even though a party seeks to invoke his right to a jury trial in a subsequent civil proceeding, the party will be precluded from relitigating issues previously decided by a non-jury tribunal if that party had affirmatively sought the prior ruling. See *Stevenson v. Goomar*, 148 A.D. 2d 217, 219-20 & n.2 (3d Dept.), appeal dismissed, 74 N.Y. 2d. 945 (1989); cf. *Ryan v. New York Telephone Co.*, 62 N.Y. 2d. 494 (1984). Since appellants raised issues central to their constitutional claims by bringing the cross-motion to quash the subpoena in the state court, we believe that their right to a jury trial on these claims in the federal court does not bar the use of collateral estoppel under New York law.

In sum, we find that the district court correctly dismissed appellants' section 1983 claims on the basis of collateral estoppel. We therefore do not reach the alternate ground of qualified immunity relied on the the district court with respect to the State defendants. With regard to appellants' remaining claims, they apparently argue only that be-

cause the district court erred in applying collateral estoppel to the section 1983 claims, it erred in dismissing the other claims. However, we agree with the district court's dismissal under Fed. R. Civ. P. 12(b)(6) of appellants' section 1985(3) claims since they were couched in terms of conclusory allegations and failed to demonstrate "some racial, or perhaps otherwise class-based, invideous discriminatory animus behind the conspirators' action" as required by section 1985(3). *New York State National Org. for Women v. Terry*, 886 F 2d. 1339, 1358 (2d Cir. 1989), cert. denied, 110 S. Ct 2206 (1990). Given the absence of federal claims left to adjudicate, the district court properly dismissed the pendent state-law claims. *See Federman v. Empire Fire & Marine Ins. Co.*, 597 F. 2d 798, 809, (2d Cir. 1979).

The judgment of the district court is affirmed.